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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6691

ALLYN SIELAFF, Director, Department of Corrections, and JOSEPH CANNON, Warden, Illinois State Penitentiary, Stateville Branch,

Petitioners,

vs.

FRANKLIN HICKMAN, Jr.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS

This petition asks this Court to review the order and opinion filed by the U.S. Court of Apepals for the Seventh Circuit in the case docketed in that Court as *United States of America ex rel. Franklin Hickman* v. *Allyn Sielaff*, No. 75-1234. The order and opinion of the Court of Appeals were handed down on August 28, 1975; as of this writing, the opinion has not been officially reported. A copy of this opinion is attached to this petition as Appendix A.

The order that the petitioner is asking this Court to review conditionally granted a writ of habeas corpus to an Illinois prisoner and reversed a judgment of the U.S. District Court for the Northern District of Illinois. The judgment of the District Court, which denied respondent Hickman's petition for a writ of habeas corpus, was announced in an unreported memorandum opinion filed on January 21, 1975. A copy of this memorandum opinion is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed here was entered on August 28, 1975. That Court stayed its mandate in the case for 30 days pending the filing of this petition.

No petition for a rehearing was filed in the Court of Appeals, and no request has been made that this Court extend the time within which the petition for a writ of certiorari may be filed.

The statutory provision believed to confer on this Court jurisdiction to review the judgment of the Court of Appeals is contained in 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether, in the absence of a claim that his trial counsel was incompetent, the respondent can raise in a federal habeas corpus petition the argument that he was denied due process of law when his counsel did not object to the trial judge's holding of a hearing on the voluntariness of a confession in the presence of the jury.

STATEMENT OF THE CASE

On September 16, 1969, two men walked into a liquor store in South Beloit, Illinois and confronted the manager, who was working behind a counter, with the announcement, "this is a stickup." One of the intruders had a gun. The manager made a movement, and the armed man fired, striking the former in the stomach. Both intruders then fled the scene.

Respondent Franklin Hickman was charged in connection with these events with the offenses of attempted murder and attempted armed robbery. After a jury trial in Winnebago County, Illinois, he was convicted of both crimes. On direct appeal in the Illinois Appellate Court, his conviction was affirmed. Hickman then brought a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. That Court dismissed his petition after a review of the trial court record. Hickman then brought to the United States Court of Appeals for the Seventh Circuit an appeal of the order of dismissal, claiming that, in the Illinois courts, he was denied the right guaranteed to him by this Court's decision in *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964).

At respondent's trial, two of the prosecution witnesses—Stanley Mickelson, a Winnebago County Sheriff's detective, and Rolland McFarland, a Winnebago County assistant state's attorney—testified that, on September 23, 1969, Hickman made to them a statement that amounted to a con-

fession to the crimes of which respondent was convicted (R. 193 *et seq.* and R. 199 *et seq.*).[1] The circumstances leading up to the testimony of these two witnesses—and, indeed, the only facts truly crucial to the resolution of the sole issue posed by this case—are as follows:

In his case in chief, the prosecutor undertook to question detective Mickelson about the circumstances surrounding the taking of respondent's September 23 statement (R. 158 *et seq.*). Nearly 40 questions were asked and 40 answers given on the topic of the conditions under which Hickman gave this statement (R. 158-167). The entire colloquy took place in the presence of the jury. The record reflects that during this questioning, respondent's counsel made no objection to the fact that the jury was hearing testimony bearing on the voluntariness of the incriminating statement. The sole objection made by Hickman's attorney during this colloquy was that, at one point, the witness was testifying as to personal opinions rather than as to facts observed (R. 164).

In his testimony Mickelson recited that, before respondent made the damaging admissions, several events took place. One of these was that Mickelson gave Hickman the four advisements required by *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Another was respondent's statement

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1. "R." designates the Report of Proceedings in *People* v. *Hickman, etc.*, Indictment No. 1206 in the Circuit Court of the 17th Judicial Circuit, County of Winnebago. This Report is part of the record on appeal filed in the instant case with the Clerk of the U.S. Court of Appeals for the Seventh Circuit.

that he understood these rights (R. 158-59). Then, according to Mickelson's testimony, Hickman was allowed to make two phone calls and did in fact speak, in separate calls, to his mother and to his girl friend (R. 159-60). The detective stated that, after making these calls, Hickman said that he would give the authorities a statement "as to the events that had taken place prior to and after the robbery" (R. 160). Then, Mickelson said, respondent was asked to sign two forms that expressed the fact that Hickman had declined the opportunity to call an attorney and that he understood his *Miranda* prerogatives but still wished to make a statement (R. 161-62).

The detective went on to testify as to the mechanics by which a court stenographer took Hickman's statement in shorthand and then typed a copy from her notes (R. 164-65) and by which respondent was given each page of the typed version—on which pages he made several corrections (R. 165-66). Mickelson noted, finally, that Hickman declined to sign the written version of the statement that he had read and corrected (R. 166).

Defense counsel did not object to any of this extensive testimony bearing on the circumstances surrounding the taking of the statement. He did object when the prosecutor asked, at the end of the colloquy: "Mr. Mickelson, can you state to the jury what the defendant said to you with regard to the offense of September 16th or thereabouts?" (R. 166-67). The trial judge then went into a conference with opposing counsel outside the presence of the jury.

Hickman's attorney began this conference by explaining that his objection was "to anything at all coming in the way of conversations in view of the fact that this man had previously asked for an attorney, and apparently

he had been given some phone calls" (R. 167). Defense counsel went on to say: "Under the *Miranda* case it is a heavy burden on the State to prove why he decided to waive an attorney, having asked for one if the questioning continued. I make my objection on that, to anything coming in that he says" (*Ibid.*).

Then, an argument—not pertinent here—ensued between counsel over whether the defense objection to the incriminating statement was being made in a timely fashion. Finally, the trial judge suggested that the prosecution "call any other witnesses . . . who can fully inform the Court and jury as to the circumstances of the waiver in this situation"(R. 171). The judge added that he thought that "the most correct approach that we can take in this situation is to hear all the circumstances having to do with everything of substance in the statement. and then I will determine whether it is admissible, whether there has been a waiver" (*Ibid.*).

Respondent's counsel then requested that the court "now rule that my objection is going to continue through each witness who is going to testify to what the defendant said" (R. 172). This request resulted in the following colloquy:

> THE COURT: Well, your objection already made will stand, and I have not yet ruled on it.
>
> MR. BEYNON [defense counsel]: All right.
>
> THE COURT: And your objection goes to the admission of whatever the substance of the statement in question is concerning, and that is a standing objection until I have either sustained or overruled that objection.
>
> MR. BEYNON: All right. I ask this only for the decorum in the courtroom.
>
> THE COURT: Yes, that's perfectly proper (R. 172-73).

Proceedings were then resumed in the presence of the jury. The prosecutor began direct examination of Rolland McFarland, an assistant state's attorney of Winnebago County, who was also present when Hickman made the September 23 statement (R. 174 *et seq.*). McFarland, like Mickelson, testified to the circumstances surrounding the taking of that statement. Respondent's lawyer then cross-examined McFarland on the matters about which he had testified on direct examination, concentrating, *inter alia,* on the fact that Hickman refused to sign the typed copy of the statement (R. 180-83). Defense counsel then cross-examined detective Mickelson in an effort to impeach his prior testimony about the taking of the statement; here again the emphasis was on the conditions under which the statement was given, not on the substance of the admissions made by Hickman (R. 184-88).

After the cross-examination of Mickelson, the court convened another conference with opposing counsel outside the presence of the jury. After averring that "this procedure that we have followed here is slightly unusual, but I think correct" (R. 189), the judge made this ruling:

> I will deny the defendant's objection to the use of the matters contained in the statement, or the conversation that was testified to by the witness. I believe that the defendant effectively and knowingly waived his rights to counsel, and his right to remain silent. I think he was fully informed as to these necessary matters, and that he knowingly and voluntarily made whatever statements were made to the officers, so the objection is overruled and the people may now proceed with either of the witnesses that they wish, or whatever witnesses they wish to call (R. 189-90).

Then, once again in the presence of the jury, the prosecution called McFarland back to the stand, and this witness testified as to the substance of the incriminating admissions made to him on September 23 by the respondent. After a brief cross-examination of McFarland by defense counsel, detective Mickelson was also called back, and he, too, testified as to the contents of the September 23 statement (R. 193 *et seq.*). Hickman's lawyer then cross-examined Mickelson.

In neither the federal district court nor in the court of appeals did the respondent advance the claim that his trial counsel had been incompetent as a matter of constitutional law. His principal contention in both of those forums was that he had been deprived of the right defined by *Jackson* v. *Denno,* 378 U.S. 368, 84 S. Ct. 1774 (1964).

REASONS FOR ALLOWING THE WRIT

IN THE ABSENCE OF A CLAIM THAT HIS TRIAL COUNSEL WAS INCOMPETENT AS A MATTER OF CONSTITUTIONAL LAW, THE RESPONDENT CANNOT RAISE ON FEDERAL HABEAS CORPUS THE CLAIM THAT HE WAS DENIED DUE PROCESS OF LAW BECAUSE HIS COUNSEL DID NOT OBJECT TO THE TRIAL JUDGE'S HOLDING OF A HEARING ON THE VOLUNTARINESS OF A CONFESSION IN THE JURY'S PRESENCE.

I.

The Court Of Appeals Contravened The Rule Laid Down By This Court In *Fay* v. *Noia*, 372 U.S. 391 (1963), By Second-Guessing The Rightness Or Wrongness Of An Action Of Trial Counsel Rather Than By Determining, As *Fay* Requires, Simply Whether The Action Was Based On Some Strategic Or Tactical Decision.

In a frequently quoted passage, this Court, in *Fay* v. *Noia*, 372 U.S. 391, 83 S. Ct. 822 (1963), defined in these terms conditions under which a certain claim could be deemed to have been waived for purposes of federal habeas corpus:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default.

Fay v. *Noia*, 83 S. Ct., at 849. This language suggests that, when confronted with the question whether a given action of defense counsel or of a defendant constitutes a deliberate by-pass of state procedures, the federal court is to determine whether the action in question is grounded in "strategic, tactical, or . . . other reasons," *Ibid.*, and to confine itself to this fairly limited inquiry. There is nothing in the language of *Fay* to indicate that this case authorizes the federal courts to go beyond this factual determination and to pass subjective judgment to whether the action by counsel or the defendant was wise or ill-advised.

In the instant case, the Court of Appeals for the Seventh Circuit greatly overshot the goal defined by the *Fay* decision. At the respondent's trial in the Illinois courts, respondent's counsel objected vociferously and repeatedly to the trial judge's conclusion that a confession given by the respondent to the police was obtained in compliance with the rules of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).[1] Counsel did not, however, despite several opportunities to do so, register any objection to the manner in which the trial court ascertained whether the securing of the confession had been accomplished in accordance with all applicable constitutional requirements—namely, by a hearing conducted by the trial judge largely in the presence of the jury. The fact that counsel objected so strongly and so clearly to the substantive admissibility of the confession

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1. See the recitation of the facts adduced at respondent's Illinois trial, *supra.*, p. 4, and *infra*, p. 16.

but did not object to the manner by which that admissibility *vel non* was determined compels the conclusion that counsel's failure to object to the procedure employed by the trial judge was the product of a conscious decision rather than of inadvertence. If counsel had made no objection to any evidence concerning the confession, there would be some ambiguity as to whether the lack of objection was intentional. Since, however, counsel here objected as to one aspect of the confession issue but not as to another, the conclusion that the absence of an objection as to the procedure used was the result of a conscious decision is inescapable.

Under *Fay*, the question then becomes whether the conscious decision of counsel was grounded in some valid strategic or tactical consideration—whether or not, in retrospect, the decision appears to have been the wisest one that could have been made. In the instant case, the Court of Appeals found a valid tactical reason for counsel's failure to object to the holding of the admissibility hearing in the jury's presence, but, not content with merely making that finding, the Court went on to criticize the *quality* of counsel's decision:

> He [i.e., defense counsel] may very well have thought that the facts leading up to the giving of the statement were not per se harmful and, entertaining an idea not uncommon among lawyers that frequent objections might alienate the jury, he may have refrained from objecting until the crucial matter of the substance of the confession was reached. *This would appear to provide minimal tactical advantage. U.S. ex rel. Hickman* v. *Sielaff*, Slip Opinion, at A17 (Emphasis added).

By making a value judgment as to the wisdom *vel non* of counsel's action rather than by simply determining whether

the action was based on a valid tactical or strategic objective, the Court of Appeals has seriously misapplied the waiver standard enunciated by this Court in *Fay*.

The clear fact not confronted by the opinion of the Court of Appeals is that defense counsel allowed to be placed on the record 40 questions and 40 answers regarding the circumstances surrounding of the confession.[2] Counsel might have forestalled this procedure without assuming the least risk of alienating the jury by requesting a "sidebar" conference with opposing counsel and the trial judge. At such a conference, which would of course have been out of the hearing of the jurors, defense counsel could have asked that a hearing more along the lines of the procedure outlined in *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964), be conducted. Counsel chose not to take this course, and nothing in the record suggests that this decision should not be binding on his client, see *Henry* v. *Mississippi*, 379 U.S. 443, 85 S. Ct. 564 (1965) and *Fay* v. *Noia*, *supra*, at 849 of 83 S. Ct. This Court, therefore, should grant a writ of certiorari in this case and determine whether the respondent has not in fact intentionally by-passed state procedures in the sense defined by *Fay*.

II.

The Respondent Has Made No Claim In Any Court That His Trial Counsel Was Incompetent As A Matter Of Constitutional Law, And, In The Absence Of That Contention, The Respondent Can Prevail In This Case Only If He Did Not Intentionally By-Pass State Procedures.

For the reasons stated in Section I., *supra*, of this brief, and as is amply illustrated by the detailed factual gloss

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2. See *supra*, p. 5.

given in Section III., *infra*, this respondent clearly has bypassed the opportunity in the Illinois courts to object to the trial judge's failure to conduct the admissibility hearing outside the jury's presence. If the respondent has a habeas remedy, then, the remedy could be based only on the claim that his trial counsel's representation at trial failed to meet minimal 6th Amendment standards of competence. The respondent has not advanced this claim in any court, state or federal, in this case. Precisely opposite here is the statement by the Court of Appeals for the Second Circuit that:

> A lawyer must be able to determine questions of strategy during trial; and unless there are exceptional circumstances or unless the lawyer is so incompetent as to deprive the defendant of the right to effective assistance of counsel, his decision regarding trial strategy must be binding. See *United States ex rel. Schaedel* v. *Follette*, 447 F. 2d 1297 at p. 1300 (2d Cir. Aug. 13, 1971); *United States ex rel. Bruno* v. *Herold*, 408 F. 2d at 128-129; *United States ex rel. Agron* v. *Herold*, 426 F. 2d 125, 127 (2d Cir. 1970); *Kuhl* v. *United States*, 370 F. 2d 20, 26-28 (9th Cir. 1966) (en banc).

United States ex rel. Cruz v. *LaVallee*, 448 F. 2d 671, at 679 (2d Cir. 1971).

Similarly, the Court of Appeals for the Fifth Circuit, in *Aaron* v. *Capps*, 507 F. 2d 685 (5th Cir. 1975), found, in a situation similar to the one present here, that there are only three classes of cases in which "waiver by the attorney will not be binding upon the client," *Ibid.*, at 690. Noting the general rule that "a 'waiver' by counsel is not to be invalidated . . . merely because the attorney did not explain the decision to, or consult with, his client," *Ibid.*,

at 690, the *Aaron* Court isolated these three categories of exceptions to the board principle: (1) cases in which trial counsel is constitutionally incompetent, (2) cases in which "an inherently personal right of fundamental importance is involved" (a formulation adopted from *Winters* v. *Cook*, 489 F. 2d 174, 178 (5th Cir. 1973 *en banc*)) and (3) cases in which counsel is confronted with a "grisly choice," 507 F. 2d, at 690. The instant case falls within none of the exceptions stated by the *Aaron* decision. Respondent's counsel was not faced with a "grisly choice" as the term is used in *Aaron* and also in *Fay*, 83 S. Ct., at 849, since all counsel had to do was to request a sidebar conference and to then object to the jury's hearing of the evidence bearing on the admissibility of the confession. Moreover, at stake here was not a personal fundamental right but, rather, the use of a specific procedural device designed as a prophylactic measure for protecting the 5th Amendment right in question,[3] *viz.*, a hearing outside the jury's presence. And, finally, incompetence of counsel is not present in this case, since respondent has not even argued that his lawyer was not competent, and a review of the transcript of respondent's Illinois trial would reveal that the public defender who represented the respondent did so in a vigorous, professional manner.

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3. See *Michigan* v. *Tucker*, 94 S. Ct. 2357, 2364 (1974), for the clear and important distinction between constitutional rights as such and prophylactic standards established by specific cases to protect those rights.

III.

The Respondent Was Not Denied His *Jackson* v. *Denno* Right Because His Attorney Clearly Indicated Approval Of The July's Hearing The Testimony On The Voluntariness Of The Confession By Objecting Only To The Substantive Admissibility Of The Confession Rather Than To The Manner Of Ascertaining Its Admissibility.

The ultimate issue presented in this case is whether the petitioner was denied the right guaranteed to him by this Court's decision in *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964). We begin with the Court's own gloss on the *Jackson* rule in *Pinto* v. *Pierce*, 389 U.S. 31, 88 S. Ct. 192 (1967): "This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances," *Pinto*, 88 S. Ct., at 193. The *Pinto* case makes it plain that there are circumstnces in which the hearing on the voluntariness of an incriminating statement can constitutionally be conducted in the presence of the jury.

Specifically, the *Pinto* decision holds that a voluntariness hearing conducted in the jury's presence is permissible when (1) the defendant, through his counsel, consents to having the hearing held in this manner and (2) the trial judge makes a specific finding that the challenged confession was, in fact, voluntarily given. As the *Pinto* court stated: "Since trial counsel consented to the evidence on voluntariness being taken in the presence of the jury, and the judge found the statement voluntary, respondent was deprived of no constitutional right," 88 S. Ct., at 193-94.

Both of the elements required by the *Pinto* decision are present in the instant case, and the district court's order

dismissing the petition for a writ of habeas corpus should, therefore, be affirmed. The second of the two *Pinto* requisites—the trial judge's specific finding that the challenged confession was voluntarily obtained—can be readily identified in the record of this case. After hearing the testimony on the circumstances under which the respondent's statement was taken on September 23, 1969, the Winnebago County circuit judge made this finding and ruling:

> I will deny the defendant's objection to the use of the matters contained in the statement . . . I believe that the defendant effectively and knowingly waived his rights to counsel, and his right to remain silent. I think he was fully informed as to these necessary matters, and that he knowingly and voluntarily made whatever statements were made to the officers, so the objection is overruled . . . (R. 189-90).

One could hardly ask for a clearer, more decisive manifestation of the discharge by the trial judge of the duty imposed on him by *Jackson* and *Pinto*—that of making an independent determination, based on the evidence presented to him, of the voluntariness of the challenged admissions. The instant case, then, complies with utmost strictness with the mandate laid down in *Sims* v. *Georgia*, 358 U.S. 538, 87 S. Ct. 639 (1967), that the trial court's conclusion "that the confession is voluntary must appear from the record with unmistakeable clarity," 87 S. Ct., at 643.

We turn, therefore, to the first of the *Pinto* requirements: the defendant's consent, expressed through his counsel, to the taking of the testimony on voluntariness in front of the jury, see *Pinto*, 88 S. Ct., at 193. In *Pinto*, the trial judge expressly asked defense counsel whether he had any objection to the holding of the voluntariness hearing in the presence of the jury, and counsel replied,

"I have none." *Pinto*, at 193. In the instant case, the waiver of the *Jackson* v. *Denno* hearing is less explicit than the *Pinto* waiver, but there can be no mistaking the unambiguous import of the relevant pages of this record (R. 158-203): Hickman's attorney, by his words and actions, expressed full approval of the Winnebago County trial judge's procedure of letting the jury hear the evidence bearing on the voluntariness of respondent's confession.

The record discloses, for example, that defense counsel let the prosecutor ask detective Mickelson about 40 questions relative to the voluntariness issue without once objecting to the fact that all of Mickelson's answers were being heard by the jury (R. 158 *et seq.*). Respondent's attorney registered no objection while Mickelson covered, in considerable detail, the adequacy of the *Miranda* advisements and of respondent's expression of waiver and described generally the conditions under which Hickman made his incriminating statement on September 23, 1969 (*Ibid.*). The record reflects that defense counsel objected only when the prosecutor sought to elicit the substance of the confession by asking, "Mr. Mickelson, can you state to the jury what the defendant said to you with regard to the offense of September 16th or thereabouts?" (R. 166-67). The inescapable inference is that the defense attorney objected, not to the procedure by which the voluntrainess of the statement was developed (*i.e.*, in the jury's presence), but only to the admission into evidence of the statement. Under these facts, one must conclude that the attorney, like the defense lawyer in *Pinto*, expressed his complete indifference to whether or not the jury heard the volnutariness evidence and hence waived the *Jackson* v. *Denno* hearing.

Subsequent portions of the record provide even more support for this conclusion. Immediately after defense counsel's objection to the question as to what Hickman said to Mickelson and McFarland on September 23 (R. 166-67), the trial judge convened a conference with the opposing attorneys outside the presence of the jury. Hickman's lawyer began this conference by explaining that his objection was directed at "anything at all coming in in the way of conversations in view of the fact that this man had previously asked for an attorney" (R. 167). This statement demonstrates that counsel was arguing that the confession was, as a matter of *Miranda* law, inadmissible; he was not arguing that the jury should not hear the evidence bearing on voluntariness. Moreover, counsel went on to say: "Under the *Miranda* case it is a heavy burden on the State to prove why he decided to waive an attorney, having asked for one if the questioning continued. I make my objection *on that, to anything coming in that he says*" (emphasis added; R. 167). This explanation of the defense position, too, shows that the defense was objecting only to the conclusion that the confession met applicable constitutional standards but was completely indifferent to whether or not the jury heard the admissibility testimony.

Later on in this same conference between the judge and opposing counsel, the court said:

> And your objection goes to *the admission of whatever the substance of the statement in question is concerning*, and that is a standing objection until I have either sustained or overruled that objection (emphasis added; R. 172-73).

Expressing his approval of the court's formulation of the defense position, Hickman's lawyer then said, "all right" (*Ibid.*). This exchange reinforces the point that we have

been laboring here—that the defense objection was aimed at the admission into evidence of the confession, not at the procedure by which admissibility was determined. Even though the judge said that the State should call other voluntariness witnesses before the jury (R. 171), Hickman's lawyer assented to the court's characterization of the objection as being one that "goes to the admission of whatever the substance of the statement in question is concerning" but expressed no opposition to the judge's request that the prosecution call other witnesses who could testify before the jury on the voluntariness question (R. 172-73).

The point that we urge on this Court is in no sense to be taken as an endorsement of the peculiar procedure used in the Illinois trial court. The constitutionality of that procedure is not the issue here: the issue is the narrow one whether, under the singular circumstances presented by the record, the two requisites defined by the *Pinto* court are met. A realistic reading of the record indicates that both requirements are met because (1) the Winnebago County trial court made an independent finding that the confession was voluntary and (2) respondent's counsel, by his words and actions, expressed assent to the holding of the voluntariness hearing in the jury's presence.

CONCLUSION

For these reasons, the petitioner respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

In The

United States Court of Appeals

For The Seventh Circuit

No. 75-1234

UNITED STATES OF AMERICA, ex rel. FRANKLIN HICKMAN, JR.,

Petitioner-Appellant,

v.

ALLYN SIELAFF, Director, Department of Corrections, and JUSEPH CANNON, Warden, Illinois State Penitiary, Stateville Branch,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—

No. 74 C 3135

ABRAHAM L. MAROVITZ, *Judge.*

Argued June 10, 1975—Decided August 28, 1975

Before CLARK, *Associate Justice (Retired)**, FAIRCHILD, *Chief Judge* and PELL, *Circuit Judge.*

PELL, *Circuit Judge.* Following a jury trial in the circuit court of Winnebago County, Illinois, the defendant

Franklin Hickman, Jr., was convicted of attempted murder and attempted armed robbery. His convictions were affirmed by the intermediate state appellate court. *People* v. *Hickman,* 3 Ill. App. 3d 919, 280 N.E. 2d 787 (1971). In the Supreme Court of Illinois the attempted robbery conviction was reversed for reasons not material here and the attempted murder conviction was affirmed. *People* v. *Hickman,* 56 Ill. 2d 175, 306 N.E. 2d. 32 (1973). Hickman's petition for habeas corpus was denied and dismissed by the district court whose memorandum opinion is unreported. The district court issued a certificate of probable cause. The sole issue before this court is concerned with the propriety of the state trial court hearing on the voluntariness of Hickman's confession which was introduced into evidence.

The parties, however, do not state the issue in the same fashion. The petitioner states it as being "[w]hether the trial court committed reversible constitutional error in holding the petitioner's hearing on the voluntariness of his confession in the presence of the jury." The respondents phrase the issue as being "[w]hether the petitioner, at his state trial, waived his right to have a hearing on the voluntariness of his confession held outside the presence of the jury."

The second statement of the issue would seem to be a threshold question because if the position of the respondents is correct, it would not appear that we would need to pursue the resolution of the issue as stated by the petitioner. While the respondents in their brief have addressed

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*Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

only the waiver matter, we are not quite certain that they are prepared to concede that there was reversible error if we should hold against them on the issue as stated by them. In any event, we deem the resolution of the issue as stated by the petitioner not to be so clear that we would want to dispose of it by saying that the respondents are confessing error *sans* waiver, or, in other words, themselves waiving opposition to the basic position of the petitioner. The voluntariness issue was raised both in the Illinois Supreme Court and the federal district court. As far as we can determine, the waiver claim either was not advanced in the first of these courts or, if it was, it was deemed to be of insufficient stature to deserve mention. The waiver issue was raised in the district court which had no difficulty in determining that "petitioner has preserved his objection to having a voluntariness hearing in the presence of the jury." Both courts, while disapproving the practice of holding the voluntariness hearing in the presence of the jury, held that upon the facts of this case the confession introduced into evidence in the trial was freely and voluntarily given.

In determining the resolution of either the threshold or the ultimate issue, we do so in the light of three Supreme Court decisions and on the basis of the state trial court transcript.

The rule of constitutional proportions was laid down in *Jackson* v. *Denno,* 378 U.S. 368 (1964) and confirmed by *Sims* v. *Georgia,* 385 U.S. 538 (1967), that a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given. In *Jackson,* the Court emphasized that "at some stage in the proceedings" a defendant has a constitutional right "to object to the use of the confession and to have a fair

hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." 378 U.S. at 376-77. In *Pinto* v. *Pierce*, 389 U.S. 31 (1967), the Court while stating, "it would seem prudent to hold voluntariness hearings outside of the presence of the jury," nevertheless stated that "[t]his Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. In *Pinto*, the judge did make the determination that the confession was voluntary and it was therefore admitted into evidence. No claim was made that because the hearing was held in the presence of the jury it was inadequate or had any other unfair consequences for the respondent.

As we read *Pinto*, a particularly significant circumstance was that the evidence regarding voluntariness was not taken until defense counsel made it quite clear that there was no objection to having the voluntariness of the admission considered in the presence of the jury.[1] The respondents in the present case, of course, place their principal reliance upon the present case falling within the *Pinto* standard and assert that a realistic reading of the record indicates that the two requisites defined by *Pinto* were

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1. "At his trial the court asked defense counsel whether there was any objection to the testimony being taken in the presence of the jury. Defense counsel replied, 'None whatsoever.' The court continued, 'As you know, it can be taken in their presence or outside of their presence, and that is a matter of discretion with the Court but I am inquiring of you if you have any objections. If you did I would hear you but I assume you have none.' Again counsel replied, 'I have none'." *Pinto, supra*, at 33.

met because (1) the Winnebago County trial court made an independent finding that the confession was voluntary and (2) petitioner's counsel, by his words and actions, expressed assent to the holding of the voluntariness hearing in the jury's presence.

We turn to the state trial court transcript and in doing so we have no reluctance in saying that we are impressed by that which is implicit in the record, namely that the trial court judge did appear to be most conscious of attempting to preserve the constitutional rights of the defendant before him.

The situs at which the crime allegedly took place was a liquor store in South Beloit, Illinois. A merits issue in the criminal trial was whether the defendant was in the store in the capacity of a holdup man or merely as an innocent prospective purchaser of the commodity dispensed therein. The issue with which we are concerned in this appeal was developed in the testimony of Stanley Mickelson, a detective of the Winnebago County Sheriff's Department. Apparently Hickman was injured when hastily departing from the store. Detective Mickelson had proceeded to Chicago upon information that Hickman could be found in Roosevelt Hospital in Chicago. Mickelson was accompanied by several officers of the Chicago Police Department. Hickman was located in the hospital and when the officers went into his room Detective Gordon of the Chicago Police Department advised Hickman "of his rights" and Mickelson read to him the complaint for arrest. Mickelson did not recall Gordon's exact words except that "[h]e advised him that he had a right to remain silent and anything he said would be used against him in a court of law, and he had the right to an attorney and such."

There were apparently four officers with Mickelson, none of whom testified in the present case on any phase thereof. Hickman was taken by the officers to district headquarters for processing. In response to the question of whether there was any conversation between any of the officers and the defendant the answer was given in the affirmative. The witness then proceeded to volunteer that "Sgt Gordon of the Chicago PD questioned the defendant in relation to the location of the gun." This brought an objection as to the conversation at which point the trial judge said that he would hear the matter of the objection outside the presence of the jury. Counsel for the defense pointed out that nothing apparently had been said about whether the defendant could have an attorney appointed for him and that there was nothing of waiver involved yet. Counsel stated in response to a question from the court that he was interposing an objection based on the voluntariness of the conversation that the officer was apparently about to give. The colloquy then developed that in advance of trial the defense had been given notice of an oral statement reduced to writing but had no information with regard to oral statements not reduced to writing.

The trial court then made the following statement

> "Well, it gets down then to the question that if a motion had been made prior to trial for—I'll use the work [sic] 'information' to take it out of the field of whether it is a confession or an admission or whatever — if the defendant had requested that he be given notice of any information or conversations attributed to him, it is a question of whether, in the absence of such notice that they may be used in the trial. I do not believe they can be. I believe without notice of such an item the defendant would not be in a position to make a motion to suppress such alleged conversations prior to trial.

> Now, he is entitled to make a motion to suppress now and a hearing outside of the presence of the jury can be conducted on the question, and this is what I take it is occurring at this moment. This, I take it, is the subject of the objection that counsel has raised."

The direct examination and cross-examination of Mickelson continued for some pages of the transcript which examination was conducted out of the hearing of the jury and developed that the defendant had orally stated that the gun was at his girl friend's house and was under a mattress in the bedroom. Upon cross-examination the matter of just what warnings were given was pursued. The following questions and answers then occurred.

> "Q. All right. Do you recall the defendant saying anything after these two statements by Sgt. Gordon? Did the defendant say anything?
>
> A. I believe he did make mention, something about an attorney or getting ahold of somebody, or notifying his mother. As to actually what he said, I don't recall.
>
> Q. In other words, the defendant said he wanted an attorney, is that what you are saying?
>
> A. No, I'm not saying he said it.
>
> Q. But he did say something about an attorney?
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> A. He made mention of an attorney, yes.
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> Q. That is to the best of your recollection?
>
> A. To the best of my recollection."

At the conclusion of this phase of the testimony which was out of the hearing of the jury the judge stated that he could not presume to tell the press what to do but he wanted to call their attention to the fact that this was a hearing outside the presence of the jury and that

he was going to have to rule on the question after the hearing and if he ruled the evidence was not admissible the jury would, of course, not know about it in the course of the trial. If they should read or see overnight any evidence that he might have stricken it would mean a mistrial would necessarily have to occur.

The jury was then called in and the objection to the conversation with Sgt. Gordon was sustained. We sense from the reading of the transcript and from some of the judge's observations that he gave particular significance to the fact that since the defendant had not been notified in response to a request for confessions that oral statements had been made therefore it was appropriate to conduct a voluntariness hearing even though a motion to suppress had not been made in advance of the trial. We are not entirely clear whether the trial court considered that there might be a converse significance, i.e., that if the defendant had been aware of the oral confession or admission in advance of a trial and had not moved to suppress it that such failure would be a waiver once a trial had begun.

Upon the resumption of the trial, with the jury present, the following pertinent matters were developed. The defendant was released to the out-of-town officers after processing and after the group left the police station in Chicago, Hickman was met by his girl friend and his mother. At some time before leaving Chicago the police officers took the defendant to Michael Reese Hospital because the "defendant was complaining of extreme pain as the result of injuries he had suffered, and he had been in Roosevelt Hospital for that. He was taken over there to see if he could get him some relief before bringing him back to the Rockford area." The defendant

was examined in the emergency room and it was determined that he had no fractures. The injuries had to do something with the hand and the leg area, the hip area, and the upper thigh. After the x-rays, "[h]e was then given a shot of some drug, whatever it was, pain killer to help him in his return to the Rockford area."

Upon arrival in Rockford, the county seat of Winnebago County, the defendant was taken to the ID Room in the Sheriff's Department where Mickelson "advised the defendant that he had a right to remain silent and not answer any questions; that anything he said could and would be used against him in a court of law; that he had a right to call an attorney and have him present with him before any questioning, and that if he couldn't afford to hire an attorney one would be appointed for him by a court of law before any questioning, if he should so desire. I then asked him if he understood these rights that I had explained to him and he answered 'Yes.' I then asked him if he wished to talk to me, and he didn't really say one way or the other at that time. This is when he was put in the lockup at the county jail."

Later in the morning Mickelson took the defendant from the lockup area at which time Assistant State's Attorney McFarland arrived. This was about 9:30 a.m. Mickelson again advised him of his rights along the lines previously given in testimony. The defendant asked about phone calls. He made one to his mother and one to the girl friend.

> "After he had made his two phone calls he advised us at this time that he would give us a statement as to the events that had taken place prior to and after the robbery."

Mickelson then read to the jury without objection two waiver forms signed by the defendants, one pertaining to the telephone call and one to the matter of his rights.[2] Present at this time in addition to the Assistant State's Attorney and Mickelson was a woman clerk to transcribe the statement. The procedure for doing this was then described. The defendant was asked if he wished to sign the statement to which he replied "No, he did not want to sign anything."

Upon the question being asked whether the witness could state to the jury what the defendant said to the witness with regard to the offense of September 16 or thereabout there was an objection. Defense counsel stated that he would have to object "first of all, to anything at all coming in in the way of conversations in view of the fact that this man had previously asked for an attorney, and apparently he had been given some phone calls. Apparently nothing more has been said about an

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2. "I, Franklin V. Hickman, having been duly advised by Stanley Mickelson, member of the Winnebago County Sheriff's Department, that I may use the telephone call to call my attorney, or anyone else, and I have declined to do so."

The second statement read as follows:

"I, Franklin V. Hickman, hereby state that I have been advised by Stanley K. Mickelson, who has identified himself as a Winnebago County Deputy Sheriff, that I have a right to remain silent and that I need not say anything to them or any other law enforcement officers if I do not desire, and that I need not answer any questions, that in the event that I answer any questions the answer that I give can and may be used as evidence against me."

attorney. Under the Miranda Case it is a heavy burden on the State to prove why he decided to waive an attorney, having asked for one if the questioning continued. by saying the motion was not timely to have the written conversation suppressed because counsel had been informed about this statement prior to trial and there had never been a motion to suppress. Defense counsel during subsequent colloquy observed that the first knowledge he had had that the defendant asked for an attorney at the outset of his police custody was when the witness Mickelson testified; that had he known of this conversation and of the admissions to which Mickelson was trying to testify he would have made objection, presumably by way of moving to suppress.

The court after further colloquy all out of the presence of the jury observed that he thought the best course would be to require the state "before going into the substance of the statement, to call any other witnesses that you may seek to call or choose to call or who can fully inform the Court and jury as to the circumstances of the waiver in this situation. This officer has also testified to that, but to be certain I think I will require you to bring in such further testimony in that regard as you may see fit to present."

The judge also observed "I believe the most correct approach that we can take in this situation is to hear all the circumstances having to do with everything of substance in the statement, and then I will determine whether it is admissible, whether there has been a waiver and whether the Escobito [sic] requirements have been met, and then proceed from there."

The following then occurred:

"Mr. Beynon: Could we, Your Honor, at this time —and I have a very definite reason for doing this—

I feel that if I have to object each and every time and to each and every witness and each and every comment it has a very bad effect on the jury. Could the Court now rule that my objection is going to continue through each witness who is going to testify to what the defendant said?

The Court: Well, your objection already made will stand, and I have not yet ruled on it.

Mr. Beynon: All right.

The Court: And your objection goes to the admission of whatever the substance of the statement in question is concerning, and that is a standing objection until I have either sustained or overruled that objection."

It is to be noted at this point that there apparently was no consideration given by the court or by either counsel to whether the development of the contextual background in which the statement was given, which would determine whether the substance of the statement would be admitted, should be or should not be heard in the presence of the jury.

The hearing then continued in the presence of the jury with the Assistant State's Attorney McFarland testifying as to the events which occurred while he was present at the Sheriff's Office and that the statement was typed but not signed. He stated that he did not know that defendant had asked for an attorney in Chicago and there was no conversation about that. Mickelson was then recalled to the stand for further testimony.

Following his testimony the court out of the hearing of the jury stated that he thought the defendant effectively and knowingly waived his rights to counsel and his right to remain silent and that he thought the defendant was fully

informed as to these necessary matters and that he knowingly and voluntarily made whatever statements were made to the officer. The objection therefore would be overruled.[3]

The judge then recalled the jury and advised the members of his ruling. The Assistant State Attorney again took the stand and testified to the substance of the statement Hickman had given to him and Mickelson. Although in this statement Hickman did not admit deliberately shooting the liquor store manager, the statement was clearly incriminating. Apparently there were some irrelevant

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3. The full text of the court's observations were as follows:

"Well, this procedure that we have followed here is slightly unusual, but I think correct.

"The jury are entitled to be informed of all the circumstances surrounding the giving and receiving of a statement. The Court, on the other hand, has the burden of determining whether under all the circumstances it was voluntary, and at this stage, if I believed it was not voluntary it would be my obligation to grant the standing motion or the standing objection and to strike the statement.

"I will deny the defendant's objection to the use of the matters contained in the statement, or the conversation that was testified to by the witness. I believe that the defendant effectively and knowingly waived his rights to counsel, and his right to remain silent. I think he was fully informed as to these necessary matters, and that he knowingly and voluntarily made whatever statements were made to the officers, so the objection is overruled and the people may now proceed with either of the witnesses that they wish, or whatever witnesses they wish to call."

or immaterial matters in this written statement and the Assistant State Attorney testified only to the substance of the statement. He also testified that Hickman had hurt himself when he went to get into the car and that he had fallen in the parking lot and had scraped his hand and struck his leg and this had pained him after he got in the car and had pained him when he was in Chicago and this was why he went to the hospital. Mickelson then took the stand and testified similarly as to the substance of the statement. The state rested after introducing one additional witness, a ballistics expert.

During the hearing on voluntariness no mention was made either by the court, the prosecution, or the defense counsel of the desirability or necessity of Hickman taking the stand before a final judicial determination had been made as to the admissibility of the confession. Of course, ordinarily in the suppression hearing held out of the presence of the jury the defendant may take the witness stand to relate his version of the controlling facts. We have no way of knowing whether it had been determined at the time of the admissibility hearing whether Hickman would take the stand in his own defense in front of the jury. Obviously if he had gone on the witness stand at the time of the admissibility hearing, which was in the presence of the jury, there would be little reason for not also being a witness on his case in chief.

In any event, after the state rested he did take the stand. He stated that when the detectives came to see him in the hospital one of them said, "This is your last chance, if you don't want to say anything we'll take care of you when we get in Rockford." He was then asked whether he had asked to see an attorney to which he replied, "Yes I did.

I asked them may I make a phone call so I may be able to inquire of an attorney, or get in touch with my mother, and they told me I would be able to get one later on."

Hickman further testified that since his leg and arm were hurting he had been taken to the Reese Hospital and there had been given a shot which did not cause his pain to ease.

Further testimony related to this matter:

> "A. On arriving here in Rockford I told them that my leg was hurting me very badly and I wanted to see a doctor, and the officer, there was three of them altogether, and they said they would give me some asperin [sic] which had 'PD' on them, and thereafter I told them that the pain was still hurting and I wanted to see a doctor, and he said 'Shortly, we want to talk to you first and after we finish talking to you you can see a doctor.'
>
> Q. Were you given anything else to relieve any pain during the time you were being questions?
>
> A. No. They brought some food in and asked me did I want something to eat and I told them I wasn't able to eat."
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> • • •
>
> "Q. What did you tell them?
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> A. I told them I wasn't going to sign it.
>
> Q. Did you tell them why?
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> A. I told them—when he was questioning me, he was asking me questions, and I said 'I think this is what happened, or I'm not sure.' He kept on questioning and I said 'May I see a doctor,' and he said 'Wait a minute, we'll finish this and then we'll let you see a doctor,' and he kept on asking me questions, and I said, 'We'll [sic] I think this is what happened,' and I kept on telling him I wanted to see a doctor, and

then we was talking and he was writing something down on the pad he had."

The defendant then testified to an exculpatory version of the incidents at the liquor store, and concluded by denying that he planned to rob the liquor store or to shoot the manager.

In the light of the foregoing we now consider the contention of the respondents that Hickman had waived his right to have a hearing on the voluntariness of his confession held outside the presence of the jury. Upon reading the transcript, we do not come away with a sense that the prosecution was attempting by cunning artifice to slip inculpatory confessions into the evidence. Further we have, as we previously indicated, the feeling that the trial judge was conscientiously endeavoring to preserve the constitutional rights of the defendant and to see that he had a fair trial. Counsel for defense did not object directly to the fact that testimony was being admitted in the presence of the jury concerning the events leading up to the giving of the statement but did object with reasonable vigor to the introduction of the statements themselves. We do not discern from the record that any of the participants were aware that there had previously been expressed by the highest court in the land the opinion that the holding of such a hearing in the presence of such a jury was undesirable. Waiver, of course, ordinarily connotes some knowledge that something is being waived. While we have mentioned what appears to be to us fairness aspects, or the desire for fairness in the trial, nevertheless we can only conclude that the entire proceedings were conducted somewhat on the loose side. Formalism in objections and making a record should not be an end in and of itself but these procedural aspects have been developed during the process of protecting fundamental rights as the means designed to achieve that end.

This court has recently considered the doctrine of waiver in *United States ex rel. Adams* v. *Bensinger,* 507 W. 2d 390, (7th Cir. 1974). The rule laid down there is that the test to be applied is whether there was a deliberate tactical decision to forego the claim. In *Pinto, supra,* it is obvious that there was a deliberate decision irrespective of whether it was to the tactical advantage of the defendant there. The trial court in Pinto, although indicating that it thought the matter was a matter of discretion, nevertheless, inquired as to whether defense counsel had any objections to the matter being heard in the presence of the jury. It would appear to us where the decision is so clearly, definitely, and knowledgeably made that despite the language in Adams no particular tactical advantage need to be shown. The tactical advantage, however, assumes importance where the situation is ambiguous as it is in the present case. Counsel at no time indicated that he was consciously making a choice or indeed he at no time indicated that he was aware that he had a choice to make. He may very well have thought that the facts leading up to the giving of the statement were not per se harmful and, entertaining an idea not uncommon among lawyers that frequent objections might alienate the jury, he may have refrained from objecting until the crucial matter of the substance of the confession was reached. This would appear to provide minimal tactical advantage. Counsel had, of course, known in advance of the written statement but did not know until Officer Mickelson was on the stand that his client had talked about an attorney in Chicago prior to being taken to Rockford. At that time he objected successfully to the oral statements made to the officers in Chicago.

Under the *Adams* test, which we hold as applicable here, we find "there is no basis for concluding that the failure

to pursue the matter more forcefully in the state courts was an attempt to derive a tactical advantage." 507 F. 2d at 392. We reject the respondents' reliance on waiver.

The question remains, of course, as to whether, irrespective of waiver, there was reversible constitutional error in holding the hearing in the manner it was here held in the presence of the jury.

In our opinion, while the question perhaps may be a close one, what happened here did not pass constitutional muster.

During the course of determining whether the oral statements in Chicago would be admitted, the judge became aware of the incriminating factor that the defendant's gun had been hidden under the mattress of Hickman's girl friend. Therefore, prior to the voluntariness hearing here in issue, there had been established a potential influence on the mind of the judge of the truth of the written confession. As pointed out in *Jackson* v. *Denno*, the determination of voluntariness should stand apart from the influence of the truth or falsity of the confession. 378 U.S. at 377. This situation is emphasized more dramatically, however, with regard to the principal statements, the substance of which did go into evidence before the jury. Without hearing the defendant's version, the trial judge decided that the confession was voluntarily made and that Hickman was not denied counsel. It is to be noted in *Pinto* that over and above the fact that counsel consciously made the choice of permitting the hearing to be conducted in the presence of the jury, the determination of voluntariness was not made until after all evidence concerning that subject was heard which included the testimony by the respondent. We fail to see how a voluntariness hearing can be complete by just hearing one side of the situation. This has improper ex parte aspects.

The argument may be made that if the defendant's testimony was subsequently heard the judge could then declare a mistrial if he found the testimony of the defendant credible on showing nonvoluntariness. This is where the influence of the truth of the confession enters the picture because the judge had heard it and knew, in part at least, that it was true. Of course, the jury did also ultimately determine the voluntariness question but if that body was aware, as it must have been, that the judge had overruled the objections, the fact that the judge permitted the testimony to go in could not fail to have carried weight in the jury's mind. By making the determination without hearing the defendant's version, the defendant was, of course, placed under compulsion to take the stand in his own case. The opinion in *Pinto* does not discuss the matter of this compulsion but, again, there counsel consciously agreed to the conduct of the hearing in the presence of the jury.

There are two factors here that could well have reflected upon the voluntariness of a statement, the first being the fact that there had been conversation about his wanting an attorney. He stated that he had wanted an attorney and even the officer conceded that there had been some conversation about it. This was, as far as we can ascertain from the record, not known to the Assistant State's Attorney at the time he came to take the statements. We do not believe that true objectivity, judges being human beings, can be brought to the ascertainment of the voluntariness question by not hearing both sides of the controversy prior to the determination of the voluntariness issue. Also, of course, here there was some indication which was corroborated by the officer, that the defendant was in pain which, according to his own testimony, ap-

parently continued through the time of his interrogation in Rockford. Here the trial judge did not find the defendant incredible before he made the determinationi; he did not find him either credible or incredible.

While we hold that this hearing did not meet constitutional requirements, the disposition does not at this point require the granting of the writ of habeas corpus. In our opinion, Hickman is entitled, as was Jackson, "to a reliable resolution of these evidentiary conflicts." 378 U.S. at 392. Accordingly, as in *Jackson,* the judgment denying the petitioner's writ of habeas corpus is reversed and the case is remanded to the district court to allow the State of Illinois reasonable time to afford Hickman a hearing or a new trial, failing which Hickman is entitled to be released.

REVERSED AND REMANDED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

Filed January 21, 1975. H. Stuart Cunningham, Clerk

UNITED STATES OF AMERICA, ex rel. FRANKLIN HICKMAN, JR., No. 67694,
Petitioner,
vs.
ALLYN R. SIELAFF, and JOSEPH CANNON,
Respondents.
No. 74 C 3135

MEMORANDUM OPINION

Petition for Writ of Habeas Corpus

Petitioner Hickman is incarcerated in Stateville serving a sentence for attempted murder. Petitioner's conviction for attempted armed robbery was reversed by the Supreme Court of Illinois on November 30, 1973. A complete recitation of the facts of this case and its court history is reported at 56 Ill. 2d 175, 306 N.E. 2d 32 (1973).

The sole issue brought to this court on collateral attack is that treated by the Supreme Court of Illinois in *People* v. *Hickman,* 306 N.E. 2d 32 (1973), at pages 35-38, to wit: was defendant denied a fair trial because of the procedure adopted by the trial court in determining the voluntary nature of his confession.

Petitioner claims that he was entitled to have his hearing conducted totally outside the presence of a jury, and cites as authority *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). Petitioner also acknowledges that *Pinto* v. *Pierce*, 389 U.S. 31, 88 S. Ct. 192, 19 L. Ed. 2d 31 (1967) qualified *Jackson* v. *Denno, supra*, but stresses that *Pinto* must be sharply limited to its facts.

In *Pinto* the Court states:

> This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances. *Jackson* v. *Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908, held that a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness after an adequate hearing . . . Hence, because a disputed confession may be found involuntary and inadmissible by the judge, it would seem prudent to hold voluntariness hearings outside the presence of the jury. 389 U.S. at 32.

Petitioner distinguishes *Pinto* from the situation herein by noting that *Pinto* relies heavily on the fact that the defendant there waived all objections to having the voluntariness of his admission considered in the presence of the jury. 389 U.S. at 33. We agree with petitioner that such is not so here; petitioner has preserved his objective to having a voluntariness hearing in the presence of the jury.

Pinto, however, relies on other factors in deciding whether defendant's rights were violated. The Court stated, "In this case, however, the confession was held voluntary and admitted as evidence suitable for consideration by the jury. In addition, there is no claim that because the hearing was held in the presence of the jury it was inadequate or had any other unfair consequences for the respondent." 389 U.S. at 32.

The Supreme Court of Illinois relied heavily on these factors in reaching its determination that Hickman was subjected to no constitutional infirmities at his trial.

> While defendant did not testify concerning the voluntary nature of the confession prior to the introduction of its substance, we note that neither he nor his counsel indicated that the former desired to testify, and there was no suggestion made that other witnesses would be called on behalf of defendant as to this issue. We assume that had defendant's subsequent testimony disclosed credible circumstances detracting from the conclusion that the confession was voluntary the trial court would have acted to safeguard defendant's rights. (See *United States* v. *Hathorn* (5th Cir. 1971), 451 F. 2d 1337, 1339.) Thus under the particular circumstances of this case and in view of the fact that no assertion is now made challenging the sufficiency of the evidence supporting the trial court's determination that the confession was voluntary, we find no prejudicial error exists. 306 N.E. 2d at 38.

We believe the course of action taken by the trial court was imprudent, but like the appellate courts of Illinois we also believe that under the particular circumstances of this case the action did not constitute reversible error. We do not wish to undermine the important right delineated in *Jackson* v. *Denno* by unnecessarily expanding *Pinto* v. *Pierce*, but clearly the facts of each case must be of ultimate importance in determining the equities, and those presented here do not, in our judgment, constitute reversible error at trial. Petitioner's writ of habeas corpus is denied.

ENTER:

ABRAHAM LINCOLN MAROVITZ.
Judge.

DATED: January 21, 1975